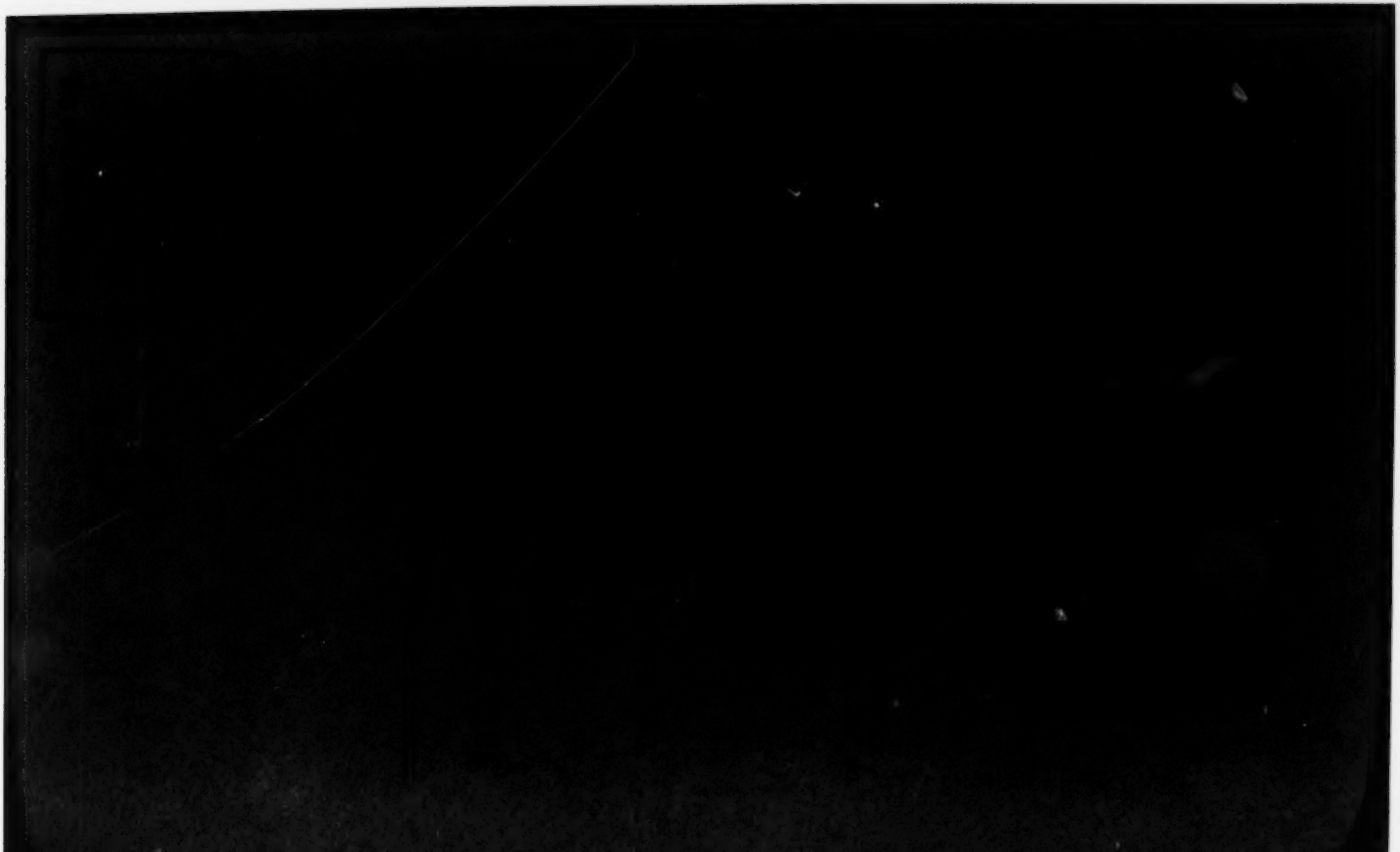

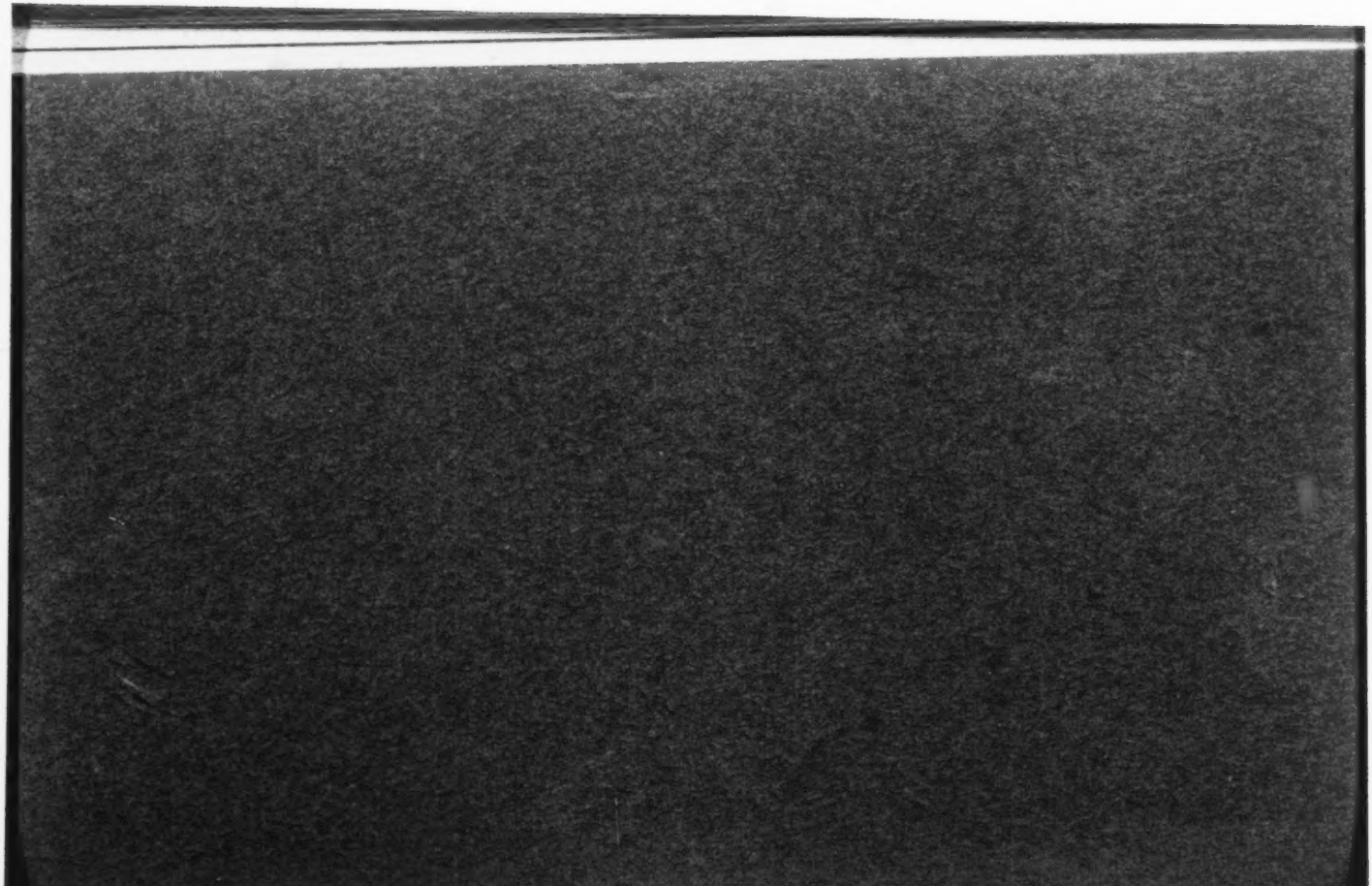

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	2
Argument	5
Conclusion	9
Appendix	11

CITATIONS

Cases:	
Blair v. *Oesterlein Co.*, 275 U. S. 220	9
Bowen v. *Hope Ins. Co.*, 20 Pick. (Mass.) 275	5
Carriso v. *United States*, 106 F. (2d) 707	9
Duignan v. *United States*, 274 U. S. 195	9
Engard v. *United States*, 38 C. Cls. 712, affirmed, 196 U. S. 511	5
Hahn v. *United States*, 107 U. S. 402	8
Harriet, The, 11 Fed. Cas. No. 6099	5, 6
Luckenbach Steamship Co. v. *United States*, 280 U. S. 173	8
Magruder v. *Drury*, 235 U. S. 106	9
United States v. *Alabama Railroad Co.*, 142 U. S. 615	8
United States v. *American Trucking Associations*, 310 U. S. 534	8
United States v. *Cerecedo Hermanos y Compania*, 209 U. S. 337	8
United States v. *Hill*, 120 U. S. 169	8
United States v. *Rodgers*, 150 U. S. 249	5
United States v. *Wiltberger*, 5 Wheat. 76	5
Waring v. *Clarke*, 5 How. 441	6
Statutes:	
Act of March 2, 1831, 4 Stat. 487	5
Act of February 19, 1895, 28 Stat. 672, as amended	6, 12
Act of March 3, 1897, c. 389, 29 Stat. 689, Sec. 9	4, 11
Tariff Act of 1913, 38 Stat. 201, § IV	8, 12
Revised Statutes:	
Sec. 2654 as amended	3, 4, 8, 11
Sec. 4382 as amended	4, 11

507247—43

Miscellaneous: Page

3 Bouvier's, *Law Dictionary* (1914 ed.) p. 3017, sub. tit. "sea" 6

33 Code Fed. Reg. § 302.120 ..... 6, 12

Customs Regulations:

1908, Articles 1861, 1682, 1683 7

1915, Article 982 ..... 7, 8

1923, Article 1104 ..... 7, 8

1931, Article 208 ..... 7, 8

Executive Order No. 9083, dated February 28, 1942 8

Hale, *De Jure Maris*, part 1, c. 4 (Hargrave Tracts, 1787), p. 10 6

H. Rep. 1660, 54th Cong., 2d Sess 5

Lee, *The History of North America*, Vol. X (Schafer, The Pacific Slope and Alaska) c. II–X (1904) 5

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 607

THE BORDER LINE TRANSPORTATION COMPANY,
PETITIONER

v.

SAUL HAAS, COLLECTOR OF CUSTOMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Washington is unreported (R. 79). The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 86–90) is reported in 128 F. (2d) 192.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered on May 18, 1942 (R. 91). A petition for rehearing was denied August 14, 1942. The peti-

tion for a writ of certiorari was filed December 31, 1942, the time for filing having been extended until that date by a Justice of this Court. (R. 95.) Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether petitioner's vessels in their voyages through tidal waters (sounds, bays and inlets) between the port of Seattle and ports on the eastern shore of Vancouver Island or the mainland of British Columbia were operating "otherwise than by sea" within the meaning of Section 9 of the Act of March 3, 1897, c. 389, 29 Stat. 689, so as to exempt them from the entrance and clearance fees imposed by Section 2654 of the Revised Statutes of 1873, as amended (19 U. S. C. § 58).

2. Whether the entrance and clearance fees imposed by Section 2654 of the Revised Statutes, as amended (19 U. S. C. § 58), were repealed by Paragraph S of Section IV of the Tariff Act of 1913, 38 Stat. 201.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and regulations involved are set forth in an Appendix (pp. 11–12, *infra*).

STATEMENT

Petitioner brought this suit in the United States District Court for the Western District of

Washington, Northern Division, to recover from the respondent, the Collector of Customs for the District of Washington, certain entrance and clearance fees totalling $1,205.00 (R. 3, 20), which had been paid under protest (R. 2–8).[1] These fees, constituting $2.50 for each entrance and clearance, were charged and collected under the authority of Section 2654 of the Revised Statutes, as amended (19 U. S. C. § 58).

Two vessels were involved. The S. S. *Border King* travelled between Seattle and other American ports in the Puget Sound area to British Columbia ports on the Strait of Georgia, the most important of which are Vancouver on the mainland and Victoria on the eastern shore of Vancouver Island. The S. S. *Border Prince* called at the same points, but in addition, on different voyages, called at ports in Queen Charlotte Strait, on the coast between Vancouver Island and Alaska, and on the west coast of Vancouver Island (R. 38–40). The ports on the west coast of Vancouver Island and on the mainland coast north of that islands are on the Pacific Ocean;[2] all the other

[1] Petitioner also sued in the same action to recover certain surveyors' fees (R. 3, 20), but as to these judgment was rendered in the district court in petitioner's favor, and respondent did not appeal from such decision. These fees are therefore not now in issue.

[2] Petitioner apparently concedes (Pet. p. 6) that the voyages to the west coast of Vancouver Island are "by sea," and also seems to eliminate from the case the voyages to points on

ports named are located on bays, harbors, sounds and inlets opening out of and constituting arms of the Pacific Ocean.[3] At all times since 1897 the Customs District at Seattle has collected entrance and clearance fees on vessels making the above voyages.

Petitioner's complaint alleged that the voyages in question were not "by sea" within the meaning of Section 9 of the Act of March 3, 1897, which exempted from these fees vessels "navigating the waters of the northern, northeastern, and northwestern frontiers of the United States otherwise than by sea;"[4] and that the fees in question had been repealed by the Tariff Act of October 3, 1913, Section IV, Paragraph S, 38 Stat. 201 (R. 7).

The district court gave judgment for respondent on the ground that the voyages in question traversed the sea and were therefore not exempted from the payment of entrance and clearance fees by the Act of March 3, 1897 (R. 79). The court below affirmed (R. 91).

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the Canadian coast north of that island by describing the voyages in question as "entirely" upon "waters east, south, and southwest of Vancouver Island."

[3] Plaintiff's Exhibit 9 (not printed) is a map of this area.

[4] This provision abolished the fees for entrance and clearance prescribed in R. S. 4382. That section had imposed lower fees for vessels navigating the waters of northern, northeastern, and northwestern frontiers "otherwise than by sea" than were prescribed for other vessels in R. S. 2654. Other fees imposed by R. S. 4382 on vessels navigating northern frontiers "otherwise than by sea" still survive. 46 U S. C. § 330.

ARGUMENT

1. Since petitioner's vessels were undoubtedly navigating waters of the northwestern frontier[5] of the United States, the question is whether they come within the exemption for vessels navigating such waters "otherwise than by sea." We agree with petitioner (Pet. p. 43) that the word "sea may have different meanings, according to the connection in which it is used." *Bowen* v. *Hope Ins. Co.*, 20 Pick. (Mass.) 275, 278. Thus it may encompass a vessel on a river in so far as the pay of naval officers is concerned (*Engard* v. *United States*, 38 C. Cls. 712, affirmed, 196 U. S. 511), but not for purposes of manslaughter (*United States* v. *Wiltberger*, 5 Wheat, 76, 93), or the regulation of fisheries (*The Harriet*, 11 Fed. Cas. No. 6099 (C. C. D. Maine)). For some purposes the "high seas" may include the Great Lakes (*United States* v. *Rodgers*, 150 U. S. 249), whereas in other connections they would not.[6]

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[5] The expression "northern, northeastern, and northwestern frontiers" was apparently derived from the Act of March 2, 1831, 4 Stat. 487. At that time, the northwestern frontier undoubtedly meant the area around Lake Superior, since the Oregon country was not settled until the 1840's and did not definitely become a part of the United States until 1846. See Guy Carleton Lee, *The History of North America*, Vol. X; (Schafer, The Pacific Slope and Alaska) c. II–X (1904).

[6] The legislative history of the Act of 1897 here involved shows that the phrase "otherwise than by sea" was primarily intended to apply to the Great Lakes. See H. Rep. 1660, 54th Cong., 2d Sess., quoted on page 29 of the petition.

In the present case, the waters of Puget Sound and the Strait of Georgia are undoubtedly tidal, and in *The Harriet, supra,* Mr. Justice Story declared that "we all know, that the sea embraces all tide waters on the coast of our country, and the bays thereof."[7] See *Waring* v. *Clarke,* 5 How. 441, 462; 3 Bouvier's, *Law Dictionary* (1914 ed), p. 3017, sub. tit. "sea"; Hale, *De Jure Maris,* part 1, c. 4 (Hargrave Tracts, 1787), p. 10. Furthermore, on many of the voyages here involved the vessels crossed the line, fixed by the Secretary of Commerce for purposes of regulating navigation, "dividing the high seas from rivers, harbors and inland waters." Act of February 19, 1895, 28 Stat. 672, as amended, 33 U. S. C. § 151; 33 Code Fed. Reg., Sec. 302.120.[8]

2. In these circumstances the court below properly held (R. 87) that since the word "sea" has many different meanings some of which would clearly include the waters traversed by petitioner's ships, the case was one in which it was inappropriate to set aside an administrative interpretation of 45 years standing. The Customs Regulations have consistently recited that the en-

[7] The opinion then distinguishes between the parts of the sea lying within the body of a country and the main sea or ocean without.

[8] The map at 33 Code Fed. Reg., p. 490, indicates that a vessel proceeding to Victoria and other points on the east coast of Vancouver Island would cross the high seas line fixed by the Secretary of Commerce.

trance and clearance fees in question were not applicable to vessels entering or clearing on the northern, northeastern, or northwestern frontiers "otherwise than by sea";[9] and since these regulations say nothing as to whether vessels arriving at the port of Seattle from British Columbia are to be classified as coming "by sea" or "otherwise", such classification was left to the collector of customs at Seattle, who was, of course, familiar with the locality and its waters. It is conceded by petitioner that since 1897 fees of $2.50 for each entrance and clearance have been collected by the collectors of customs in Seattle upon vessels making voyages such as those here involved (R. 70; Pet. p. 6), and this consistent administrative interpretation of the regulations for almost half a century must be deemed to have had the approval of the collectors' superior officers in the Department of the Treasury.[10] In the absence of some

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[9] Customs Regulations, 1931, Article 208 (d), pp. 160, 161; Customs Regulations, 1923, Article 1104, pp. 568, 569; Customs Regulations, 1915, Article 982, pp. 482, 483; Customs Regulations, 1908, Articles 1682, 1683, pp. 697, 698.

[10] Until 1903 vessels were regulated by the Department of the Treasury. In 1903 Congress caused the regulation of vessels, including the bureaus connected therewith, to be transferred from the Department of the Treasury to the Department of Commerce. By proper regulations, the various offices of Collectors of Customs have since 1903 acted as agents of the Department of Commerce in the administration of navigation laws, including the collection of navigation fees. Customs Regulations, 1908, Article 1681; Customs

exceptional circumstances, which do not appear, this consistent construction of the 1897 Act by those charged with its administration should not be disturbed. *Hahn* v. *United States*, 107 U. S. 402, 406; *United States* v. *Hill*, 120 U. S. 169, 182; *United States* v. *Alabama Railroad Co.*, 142 U. S. 615, 621; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 339 (Tariff Act); *Luckenbach Steamship Co.* v. *United States*, 280 U. S. 173, 182; *United States* v. *American Trucking Associations*, 310 U. S. 534, 543.

3. As an alternative argument, petitioner asserts that the entrance and clearance fees imposed by Section 2654 of the Revised Statutes, as amended, were repealed by Paragraph S of Section IV of the Tariff Act of 1913, 38 Stat. 201, which reads:

> * * * *Provided*, That nothing in this Act shall be construed to permit any oaths to be demanded or fees to be charged, except as provided in this Act or in section twenty-eight hundred and sixty-two of the Revised Statutes of the United States * * *.

Although this point was raised in the complaint in the district court, petitioner admittedly did not

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Regulations, 1915, Article 982; Customs Regulations, 1923, Article 1104; Customs Regulations, 1931, Article 208. The regulation of vessels was retransferred to the Department of the Treasury by Executive Order No. 9083, dated Feb. 28, 1942, 7 F. R. 1609.

argue it in the district court nor in the circuit court of appeals, for the reason (Pet. p. 48) that the latter court had previously squarely rejected the contention. *Carriso* v. *United States*, 106 F. (2d) 707 (C. C. A. 9). Since the point was not pressed or passed upon below, it is not entitled to consideration here. *Magruder* v. *Drury*, 235 U. S. 106, 113; *Duignan* v. *United States*, 274 U. S. 195, 200; *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225.

In any event, the *Carriso* decision was clearly correct. Paragraph S of Section IV of the 1913 Tariff Act, as its context shows, was designed to repeal an earlier tariff law, and the obvious purpose of the proviso in question was to prevent this repeal from reestablishing fees abolished in the earlier Act. The paragraph relates only to fees demanded in connection with the importation of merchandise and contains nothing pertinent to the entry and clearance of vessels. If construed literally and without regard for its statutory environment, the proviso would have the effect of abolishing every type of fee imposed by any government agency.

CONCLUSION

The decision below is correct. There is no conflict of decisions and no question of general importance presented. It is respectfully sub-

mitted that the petition for certiorari should be denied.

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JANUARY 1943.